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**Beverly Enterprises - Virginia, Inc., d/b/a Carter Hall Nursing Home and United Mine Workers of America, International Union.** Cases 11-CA-16107 and 11-CA-17139

November 21, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

Pursuant to a charge and amended charge filed in Case 11-CA-16107 on July 5 and 11, 1994, respectively, and a charge filed in Case 11-CA-17139 on August 12, 1996, the General Counsel of the National Labor Relations Board issued an order consolidating cases, consolidated complaint, and notice of hearing on August 29, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 11-RC-5898. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On October 25, 1996, the General Counsel filed a Motion to Strike Portions of Respondent's Answer to Consolidated Complaint and Motion for Summary Judgment and Memorandum in Support. On October 29, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 12, 1996, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

In its answer and response the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's determination in the representation proceeding that the Respondent's LPN charge nurses are not statutory supervisors.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not

raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>1</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent is now, and has been at all times material herein, a Virginia corporation with a facility located at Dryden, Virginia, where it is engaged in the business of operating a nursing home where it provides long-term health care. During the 12-month period preceding issuance of the complaint, which period is representative of all times material herein, the Respondent, in the course and conduct of its operations, derived gross revenues in excess of \$100,000 and purchased and received at its Dryden, Virginia facility goods valued in excess of \$5000 directly from points located outside the Commonwealth of Virginia. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the election held April 8, 1993, the Union was certified on June 14, 1996,<sup>2</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and part-time service and maintenance employees including cooks, dietary aides, charge nurses, nursing assistants, certified nursing assistants, laundry aides, and housekeeping aides, employed by Respondent at its Dryden, Virginia, facility, excluding the Administrator, Director of Nursing, Assistant Director of Nursing, and Registered Nurses, the Activities Director, the Social

<sup>1</sup> As we have granted the General Counsel's Motion for Summary Judgment, we find it unnecessary to pass on the General Counsel's motion to strike portions of the Respondent's answer.

Member Fox notes that she did not participate in the underlying representation case. However, she agrees with her colleagues that the Respondent has raised no new issues in this "technical" 8(a)(5) case and that summary judgment is therefore appropriate.

<sup>2</sup> The Union was initially certified on March 2, 1994. However, on August 4, 1994, the Board issued an Order granting the Respondent's Motion for Reconsideration and Revocation of Certification and remanded the proceeding to the Regional Director for reconsideration in light of the Supreme Court's then-recent decision in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994). Thereafter, on December 21, 1994, the Regional Director issued a supplemental decision reaffirming his prior finding that the Respondent's LPN charge nurses are not supervisors, and on June 14, 1996, the Board denied the Respondent's request for review.

Services Director, the Maintenance Supervisor, the Dietary Services Supervisor, the Housekeeping and Laundry Supervisor, bookkeepers, all office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

#### B. *Refusal to Bargain*

Since about April 8, 1993, and particularly by letters dated April 12, 1994, and July 22, 1996, the Union has requested the Respondent to bargain, and, since about April 8, 1993, and particularly by letters dated April 25, 1994, and July 30, 1996, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

#### ORDER

The National Labor Relations Board orders that the Respondent, Beverly Enterprises - Virginia, Inc., d/b/a Carter Hall Nursing Home, Dryden, Virginia, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to bargain with United Mine Workers of America, International Union, as the exclusive bar-

gaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and part-time service and maintenance employees including cooks, dietary aides, charge nurses, nursing assistants, certified nursing assistants, laundry aides, and housekeeping aides, employed by Respondent at its Dryden, Virginia, facility, excluding the Administrator, Director of Nursing, Assistant Director of Nursing, and Registered Nurses, the Activities Director, the Social Services Director, the Maintenance Supervisor, the Dietary Services Supervisor, the Housekeeping and Laundry Supervisor, bookkeepers, all office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Dryden, Virginia, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 5, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 21, 1996

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William B. Gould IV, Chairman

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Margaret A. Browning, Member

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Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Mine Workers of America, International Union, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and part-time service and maintenance employees including cooks, dietary aides, charge nurses, nursing assistants, certified nursing assistants, laundry aides, and housekeeping aides, employed by us at our Dryden, Virginia, facility, excluding the Administrator, Director of Nursing, Assistant Director of Nursing, and Registered Nurses, the Activities Director, the Social Services Director, the Maintenance Supervisor, the Dietary Services Supervisor, the Housekeeping and Laundry Supervisor, bookkeepers, all office clerical employees, guards and supervisors as defined in the Act.

BEVERLY ENTERPRISES - VIRGINIA, INC.,  
D/B/A CARTER HALL NURSING HOME